

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs) No. 11-1141 (Harrison County 09-F-173)

**Thomas A. Jenkins II,
Defendant Below, Petitioner**

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner's appeal, by counsel George Stanton III, arises from the Circuit Court of Harrison County, wherein the circuit court resentenced petitioner to a cumulative term of incarceration of forty to ninety years by order entered on July 13, 2011. Respondent State of West Virginia, by counsel James Armstrong, has filed a response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In September of 2010, petitioner was indicted on four counts of sexual abuse by a parent, two counts of sexual abuse in the first degree, two counts of sexual abuse in the second degree, and two counts of incest following disclosures by the minor victim, S.L., that petitioner had engaged in sexual contact with her. Prior to trial, petitioner sought the production of medical records he believed to be in existence related to medical treatment the victim received as a result of alleged non-sexual physical abuse he perpetrated, but for which he was not being prosecuted. The circuit court denied petitioner's request for production of these documents. At various times throughout the proceedings, petitioner filed motions for post-verdict judgment of acquittal and/or motions for a mistrial, which the circuit court denied. After the jury convicted him of all ten counts, petitioner was thereafter sentenced to a cumulative sentence of forty to ninety years of incarceration and was resentenced for purposes of appeal.

On appeal, petitioner argues that the circuit court erred in denying his motions for mistrial or judgment of acquittal, and also that the circuit court erred in failing to grant his pretrial motion for production of documents. In support, petitioner argues that the jurors essentially requested a mistrial due to an inability to render a verdict on the facts. Citing a jury note stating that the parties had not met their burdens of proof, petitioner argues that this is tantamount to a not guilty verdict. Petitioner further argues specific juror bias, stating that one juror knew petitioner's

brother and was so troubled by his negative connection to the brother that the juror made a special effort to inform the circuit court. As for the circuit court's denial of petitioner's pre-trial motion, he argues that he was entitled to the victim's medical records related to alleged physical abuse he perpetrated against her. Petitioner argues that he simply wanted to explore allegations that were part and parcel of the victim's lengthy statement regarding an alleged pattern of his abusive acts. While petitioner concedes that extrinsic evidence may not be used to impeach a witness on a collateral issue at trial, he argues that the issue he sought to impeach the witness on was not collateral because it was material and relevant to establish a fact of consequence. Petitioner argues that the circuit court's ruling created a chilling effect on his ability to conduct direct and cross examinations.

In response, the State argues that the circuit court engaged in a long colloquy with the juror and determined that he could remain impartial. Further, the State notes that the juror never indicated bias, but was actually fearful of reprisal from petitioner's family. Accordingly, the State argues that it was unnecessary to dismiss the juror because he was not biased and he stated that he had no problem deciding the case on the evidence presented and law provided. Further, as to petitioner's argument that the jury's note constituted a not guilty verdict, the State argues that the circuit court was correct to allow the jury to continue deliberating and in giving them a charge pursuant to *Allen v. U.S.*, 164 U.S. 492, 17 S.Ct. 154 (1896). Lastly, the State argues that petitioner was not prosecuted for any physical abuse and the State made no reference to the abuse during any part of the underlying proceedings. As such, the State argues that the medical records related to a collateral matter, and that petitioner was not entitled to use this extrinsic evidence to impeach the victim on the collateral matter pursuant to Rule 608(b) of the West Virginia Rules of Evidence.

We have previously held as follows:

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.” Syl. Pt. 2, *Walker v. West Virginia Ethics Commn.*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Syl. Pt. 2, *State v. Jessie*, 225 W.Va. 21, 689 S.E.2d 21 (2009). The Court finds no error in the circuit court's denial of petitioner's motions for mistrial or judgment of acquittal. Upon our review, the Court finds that the juror about whom petitioner complains expressed bias, but instead addressed his acquaintance with petitioner's brother out of fear of reprisal by petitioner's family. We have previously held that “[a] court should not declare a mistrial because a juror was threatened, unless it is apparent that the juror's impartiality has been so affected that he can no longer fairly decide the facts.” Syl. Pt. 3, *State v. Mayle*, 178 W.Va. 26, 357 S.E.2d 219 (1987). The circuit court questioned petitioner as to his ability to remain impartial and the juror affirmatively stated that his connection to petitioner's brother would not affect his ability to appropriately decide the case below. For these reasons, the Court finds no error in regard to the circuit court denying any of petitioner's motions based on alleged juror bias.

Additionally, the Court finds no abuse of discretion in regard to the circuit court's denial of petitioner's motions based upon allegations that the jury requested a mistrial. While our review does indicate that the jury presented a note indicating a potential deadlock, we find no error in the circuit court providing a modified *Allen* charge and requesting that the jury continue deliberations. We have previously held that:

“[w]here a jury has reported that it is unable to agree and the trial court addresses the jury urging a verdict, but does not use language the effect of which would be to cause the minority to yield its views for the purpose of reaching a verdict, the trial court's remarks will not constitute reversible error.” Syllabus Point 2, *State v. Johnson*, 168 W.Va. 45, 282 S.E.2d 609 (1981).

State v. Shabazz, 206 W.Va. 555, 559, 526 S.E.2d 521, 525 (1999). Because the circuit court did not use language encouraging the minority to yield its views for the purpose of reaching a verdict, the Court finds no error in the circuit court's decision to provide a modified *Allen* charge in response to the jury's note. Further, we do not find that any correspondence from the jury constituted a verdict of not guilty, and the circuit court's denial of petitioner's motions on this issue was not error.

Lastly, the Court finds no error in the circuit court's denial of petitioner's request for medical records. We have previously held as follows:

“The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.” Syl. pt. 1, in part, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995).

Syl. Pt. 3, *Barlow v. Hester Indus., Inc.*, 198 W.Va. 118, 479 S.E.2d 628 (1996). Petitioner sought these records in order to go on a “fishing expedition” looking for possible instances where S.L. made statements that did not comport with the medical evidence in those records. In the instant case, petitioner was not charged with crimes for the physical abuse allegedly reflected in those records, and the records would not be admissible per Rule 608(b) of the West Virginia Rules of Evidence.

For the foregoing reasons, we find no error in the decision of the circuit court, and the petitioner's conviction is hereby affirmed.

Affirmed.

ISSUED: November 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh